IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 90 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.SHAH

and

Hon'ble MR.JUSTICE K.A.PUJ

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

==========

SHREE RAM FOOD INDUSTRIES

Versus

UNION OF INDIA

Appearance:

MR ANILKUMAR D MARU for Petitioner.

MR MUKESH R SHAH for Respondent No. 1-4

NOTICE SERVED BY DS for Respondent No. 2-4

CORAM : MR.JUSTICE M.S.SHAH

and

MR.JUSTICE K.A.PUJ

Date of decision: 25/09/2002

CAV JUDGEMENT

(Per : MR.JUSTICE K.A.PUJ)

The petitioner, in this petition under Article 226 of the Constitution of India, has prayed for quashing and setting aside of the impugned order dated 18-4-2000 passed by the Commissioner of Central Excise,Rajkot, confirming the amount of Rs. 15,69,046/- being the amount of central excise duty against the petitioner, under Rule 9(2) of Central Excise Rules read with Proviso to sub-section (1) of Section 11-A of the Central Excise Act. The petitioner has further challenged the order dated 27.10.2000 rejecting the refund claim of Rs. 5,40,847/= as time barred under Section 11-B of the Central Excise Act, 1944. The relevant facts, as they are emerged from the petition, are as under.

2. The petitioner is a partnership firm and carrying on its business of Onion Dehydration at Mahuva. The petitioner had obtained SSI Registration Certificate from the Industries Commissioner, Bhavnagar on 31.1.1992. The petitioner had also obtained Sales Tax Certificate on 1.4.1992 and thereafter filed its declaration for central excise purposes showing the manufacturing process for the year 1992-93 on 9.4.1992. The petitioner, thereafter, applied for 100% EOU Certificate on 18.4.1992 and the said certificate was obtained by the petitioner on 4.12.1992. The petitioner thereafter filed central excise declaration for the years 1993-94, 1994-95 and 1995-96 on 15-4-1993, 9-4-1994 and 10-4-1995 respectively.

3. The petitioner was directed by the Superintendent of Central Excise, Mahuva, the respondent No.4 herein to pay Rs. 1,44,910/- for Domestic Tariff Area sales (in short "DTA") made in the year 1992-93 as per the point raised by the audit by letter dated 17-4-1995. In this connection, the petitioner's statements were recorded on 8.8.1995 and 14.8.1995. The petitioner had orally protested against the payment of alleged central excise duty. The petitioner was, thereafter, asked to furnish the details on DTA sales made during the period from 9.12.92 to 27.5.95 and on the basis of these details as well as the statements recorded, the respondent No.4 had directed the petitioner, vide his letter dated 20.8.1995 to pay an amount of Rs. 21,09,893/= as central excise duty on DTA sales. Since the petitioner was aggrieved by the said demand, the petitioner immediately approached the Deputy Commissioner of Central Excise, Bhavnagar, the respondent No.3 herein and lodged its protest against the said demand. The respondent No.3 however got enraged and threatened the petitioner that if within 24 hours the amount demanded was not paid, 300% penalty would be

imposed, 20% interest would be recovered, factory would be sealed, arrest would be made and prosecution would be filed against the petitioner. The petitioner was also told that the petitioner should pay for the demand first and thereafter show cause notice would be issued and after adjudication if any excess duty was found, the same would be refunded to the petitioner. The petitioner having been scared with such threats, made arrangement for the payment of the above amount of Rs. 21,09,893/and produced the receipt and chalan before the respondent No.4 on 21.8.1995.

4. Though the petitioner had paid the amount of Rs. 21,09,893/= on 21.8.1995, no show cause notice was issued for about 2 1/2 years. Ultimately, the respondent No.2 had issued show cause notice dated 5.1.1998 on the petitioner wherein it was alleged that the petitioner had not obtained the necessary permission from the Development Commissioner, Kandla Free Trade Zone, Kandla, and had also not obtained the central excise licence under Rule 174 of the Central Excise Rules, 1944 and thereby not paid the central excise duty to the tune of Rs. 21,09,893/= at that time of DTA sales, subsequently paid on 21.8.1995 and hence the show cause notice was issued calling for the explanation and show cause as to why the said duty should not be demanded and confirmed under Rule 9(2) of the Central Excise Rules read with Section 11-A(1) of Central Excise Act and why penalty should not be imposed under Rule 209-A of the Rules. The petitioner replied to the said show cause notice vide its letter dated 9.3.1998 and had also attended personal hearing before the respondent No.2 on 6.4.1998. However, the respondent No.2 had passed the order on 18.4.2000 confirming the duty demand of Rs. 15,69,046/= under Rule 9(2) read with Section 11A(1) and further ordered to appropriate the amount of duty from the amount of Rs. 21,09,863/= paid by the petitioner and refund the balance amount of Rs. 5,40,847/= being excess payment of duty. The respondent No.2 had also imposed penalty of Rs. 2,00,000/= on the petitioner firm and Rs. 50,000/= each on two partners of the firm.

5. Being aggrieved by the said order of the respondent No.2, the petitioner filed an appeal before the CEGAT and also moved a stay application which was heard by the CEGAT, Mumbai, and stay was granted against recovery of penalty vide order dated 11.8.2000.

6. Pursuant to the order passed by the respondent No.2 making an order to refund Rs. 5,40,847/=, the petitioner filed refund claim of the said amount before

the respondent No.3 on 23.5.2000. Instead of granting refund to the petitioner, the respondent No.3 had issued a show cause notice to the petitioner dated 9.8.2000 directing the petitioner to show cause as to why the refund claim of the petitioner should not be rejected as time barred under Section 11-B of the Act. The petitioner gave its reply to the said show cause notice wherein it was urged that the claim of the petitioner did not fall under Section 11-B of the Act as the refund claim arose out of the order dated 18.4.2000 passed by the respondent No.2 and the refund claim was filed by the petitioner on 23.5.2000, that is well within the period of limitation. However, the contentions urged and submissions made by the petitioner were not accepted by the respondent No.3 and he passed the order-in-original on 27.10.2000 rejecting the refund claim of the petitioner as time barred under Section 11-B of the Act and further taking the view that the payment made by the petitioner was not under protest. The respondent No.2 has further taken the view that the said order was passed by the adjudicating authority and not by appellate authority or by the court and hence the ratio of the judgment of the Supreme Court in the case of Mafatlal Industries vs. Union of India, reported in 1997 (89) E.L.T. 247 (SC) is not applicable to the facts of the petitioner's case. It is this order which is under challenge in this petition.

7. On the notice being issued by this Court for final disposal of the petition, the respondents had appeared through their learned Standing Counsel, Mr. Mukesh R. Shah and filed affidavit-in-reply of Shri S.K. Singh, working as Commissioner of Central Excise, Bhavnagar. The petition was opposed on the ground that the order passed by the Commissioner of Central Excise, Rajkot on 18.4.2000 confirming the show cause notice was already challenged by the petitioner by way of an appeal before the CEGAT and the said appeal is still pending and since the petitioner has already availed of the statutory alternative remedy the present writ petition is not required to be entertained by this Court. So far as the challenge to the order passed by the Deputy Commissioner of Central Excise, Bhavnagar on 27.10.2000 is concerned, it was contended by the respondent in affidavit-in-reply that the petitioner has got the statutory alternative remedy by way of appeal before the CEGAT and instead of filing the appeal before the CEGAT the petitioner has invoked the writ jurisdiction of this court and hence the present petition should not be entertained. It was also stated in the affidavit-in-reply that the order passed by the Deputy Commissioner of Central Excise, Bhavnagar on

27.10.2000 rejecting the refund claim of the petitioner treating it as time barred under Section 11(b) of the Act is just and proper and in accordance with the provisions contained in Section 11-B of the Act and hence no interference is called for. It was further stated in the affidavit-in-reply that the Commissioner of Central Excise, Rajkot has never passed an order of refunding the balance amount of Rs. 5,40,847 irrespective of any other provision contrary to Section 11 (b) of the Act. It was further stated in the affidavit-in-reply that the petitioner had not deposited the amount of Rs. 21,09,893/= without any protest under Rule 233(b) of the Rules and had voluntarily paid the said amount. It was further stated that at the time when the payment was made, there was no show cause notice whatsoever and the show cause notice came to be issued for the first time on 5.1.1998 and the petitioner should therefore make an application for refund within a period of six months. The time gap for duty payment and refund claim is limited to one year and since the said period of limitation expired much earlier, the Deputy Commissioner of Central Excise was justified in rejecting the refund claim of Rs. 5,40,847/= as time barred.

8. The petitioner dealt with the objections raised by the respondent No.3 in his affidavit-in-reply by filing rejoinder affidavit and requested this Court to grant refund as claimed in the petition by placing reliance on several judgments of the Hon'ble Supreme Court as well as by interpreting the provisions contained in Section 11(b) of the Act.

9. We have heard Mr. A.D. Maru, learned advocate appearing for the petitioner and Mr. Mukesh R.Shah, learned Standing Counsel appearing for the respondents. So far as the challenge to the order passed by the Commissioner of Central Excise, Rajkot on 18.4.2000 is concerned, since the petitioner has already filed an appeal before the CEGAT, Mumbai, and since the said appeal is pending for decision, we are not in a position to decide the legality and validity of the said order confirming the issuance of the show cause notice to the extent indicated therein, in the present petition. However, so far as the order-in-original dated 27.10.2000 passed by the Deputy Commissioner of Central Excise, Bhavnagar is concerned, since the said order is directly challenged before this Court invoking the prerogative jurisdiction of this Court and since we found substance in the claim of the petitioner, we are inclined to entertain the said claim of the petitioner in this petition, despite there being alternative statutory

remedy of appeal available to the petitioner. Our attention is drawn to the decision of the Hon'ble Supreme Court in the case of Shri Vallabh Glass Works Ltd. & Anr. v. Union of India and Ors., 1984 (16) ELT (S.C.) Page 171 wherein it is held that the High Courts have power for the purpose of enforcement of fundamental rights and statutory rights, to make consequential orders for repayment of money realised by Government without authority of law under Article 226 of the Constitution even if alternative remedy by way of suit is available. Our attention is further drawn to the decision of the Supreme Court in the case of U.P. Pollution Control Board and Others v. Kanoria Industrial Ltd And Another, (2001) 2 SCC 549, wherein it is held that the High Court has power to issue such a writ of mandamus, directing refund of money illegally collected, but it must be exercised sparingly depending on the facts and circumstances of each case. It was further clarified that the claim for refund cannot be denied merely because money had been passed on to State Government and by it to Central Government and had then been appropriated and disbursed. Our attention is further invited to the decision in the case of Sanita Arora vs. Union of India, 2002 (142) E.L.T. 554 (Del.), wherein it was held that the High Court has ample powers to pass appropriate orders to render complete justice where claim for refund by way of consequential relief or where petition is for enforcement of statutory obligation.

10. Coming to the facts of the present case, the petitioner had paid the amount of Rs. 21,09,893/= pursuant to the demand made and threat given by the respondents No. 3 and 4. The petitioner has filed detailed affidavit to that effect and the said fact is not controverted by the respondent No.3 in his affidavit-in-reply. It cannot, therefore, be said that the payment was voluntarily made by the petitioner. Even otherwise, after adjudication, the Commissioner of Central Excise has passed an order giving clear-cut direction that the balance amount shall be refunded to the petitioner after following the usual procedure under the law. By taking the clue from the words "after following the usual procedure under the law", the respondent No.3 is not justified either in law or on facts in rejecting the claim of the petitioner on the ground that the same is barred by limitation. While giving effect to this order, if the Deputy Commissioner of Central Excise takes the view that the claim is not acceptable as the same is barred by limitation, it would virtually amount to nullifying the effect of the order passed by the Commissioner of Central Excise and if such

an order is challenged in the writ petition before this Court, it is not just and proper to throw away the petition on the ground that the petitioner has got an alternative remedy. Having applied the law laid down by the Court in the above referred judgments, we are of the view that this Court has ample powers to entertain the claim of the petitioner in the present proceedings.

11. Coming to the second objection raised by the respondents against the refund claim of the petitioner, it is necessary to have a look at the provisions contained in Section 11-B of the Act which deals with claim for refund of duty. It reads as under :

Section 11B___Claim for refund of duty.

(1) Any person claiming refund of any duty of excise may make an application for refund of such duty to the Assistant Deputy Commissioner of Central Excise before the expiry of six months from the relevant date in such form as may be prescribed and the application shall be accompanied by such documentary or other evidence (including the documents referred to in section 12A) as the applicant may furnish to establish that the amount of duty of excise in relation to which such refund is claimed was collected from, or paid by him and the incidence of such duty had not been passed on by him to any other person;

Provided that where an application for refund has been made before the commencement of the Central Excise & Customs Laws (Amendment) Act, 1991, such application shall be deemed to have been made under this sub-section as amended by the said Act and the same shall be dealt with in accordance with the provisions of sub-section (2) substituted by that Act.

Provided further that the limitation of six months shall not apply where any duty has been paid under protest.

(2) If, on receipt of any such application, the Assistant/Deputy Commissioner of Central Excise is satisfied that the whole or any part of the duty of excise paid by the applicant is refundable, he may make an order accordingly and the amount so determined shall be credited to the fund :

Provided that the amount duty of excise as determined by the Assistant/Deputy Commissioner of Central Excise under the foregoing provisions of this sub-section shall, instead of being credited to the Fund, be paid to the applicant if such amount is relatable to -

(a) ***

(b) ***

(c) ***

(d) duty of excise paid by the Manufacturer, if he had not passed on the incidence of such duty to any other person.

(e) the duty of excise borne by the buyer, if he had not passed on the incidence of such duty to any other person.

(f) ***

Provided further that no notification under clause (f) of the first proviso shall be issued unless in the opinion of the Central Government the incidence of duty has not been passed on by the persons concerned to any other person.

(3) Notwithstanding anything to the contrary contained in any judgment, decree, order or direction of the Appellate Tribunal or any Court or in any other provision of this Act or the Rules made thereunder or any other law for the time being in force, no refund shall be made except as provided under sub-section (2)."

12. We have examined the claim of the petitioner in light of the aforesaid provisions contained in Section 11-B of the Act. We have already made it clear hereinabove that the payment of Rs. 21,09,893/=, made by the petitioner on 21.8.1995, was not the voluntary payment and it was made pursuant to the demand made by the respondent authorities towards the central excise duty for DTA sales and threats were administered for extracting the said payment from the petitioner, and hence for all purposes said payment can be treated as the payment under protest. The petitioner's case, therefore,

squarely falls within the second Proviso to Section 11-B(1) of the Act, which says that the limitation of six months shall not apply where any duty has been paid under protest. The petitioner, therefore, moved an application for refund of Rs. 5,40,847/= on 23.5.2000 pursuant to the order passed by the respondent No.2 on 18.4.2000 confirming the demand of Rs. 15,69,046/= and order for refund of balance amount of Rs. 5,40,847/= being excess payment. In this context, the following observations, made by the Hon'ble Supreme Court in the case of Mafatlal Industries Ltd vs. Union of India (Supra) are very pertinent :

146. As stated, Section 11B(2) and Section 11(B)(3) go together. The applications for refund made before the commencement of the Amendment Act, 1991, shall be deemed to have been made under Section 11B(1) of the Act as amended and it shall be dealt with in accordance with Section 11B(2) of the Act. The Section contemplates disposal of the applications pending on the date of the Amendment Act as also fresh applications filed after the Amendment Act, 1991, as per the amended provisions. Counsel for the assessees urged that the provisions relating to refund and, in particular, Section 11b(2) and (3) as amended in 1991 cannot apply to :-

1. 'Refund' made or due as per orders passed by Courts, in a suit or in a petition under Article 226 of the Constitution of India, which have become final.

2. Refunds ordered by the statutory authority concerned which have become final.

It is obvious that in such cases no application can or will be deemed to be pending on the date of the commencement of the Amendment Act. No application praying for refund is to be filed in such cases, either. No further probe, regarding the requisites for obtaining refund specified in the Amendment Act, 1991, is called for in such cases. The above aspects are fairly clear. Section 11B(2) and (3) cannot be made applicable to refunds already ordered by the court or the refund ordered by the statutory authorities, which have become final. It follows from a plain reading of Section 11B, Clauses (1), (2) and (3) of the Act. The provisions

contemplate the pendency of the application on the date of coming into force of the Amendment Act or the filing of an application which is contemplated under law, to obtain a refund, after the Amendment Act comes into force. I am of the opinion, that if the said provisions are held applicable, even to matters concluded by the judgments or final orders of courts, it amounts to stating that the decision of the court shall not be binding and will result in reversing or nullifying the decision made in exercise of the judicial power. The legislature does not possess such power. The court's decision must always bind parties unless the condition on which it is passed are so fundamentally altered that the decision could not have been given in the altered circumstances. It is not so herein. [Shri Prithvi Cotton Mills Ltd. & Anr. v. Broach Borough Municipality & Ors. [1970 (1) SCR 388] and Madan Mohan Pathak v. Union of India & Ors. etc. [1978 (3) SCR 334]. See also Comorin Match Industries (P) Ltd. v. State of Tamil Nadu [JT 1996 95) SC 167 = 1996 (65) E.L.T. 233 (SC)]. Alternatively, it may be stated that duty paid in cases, which finally ended in orders or decrees or judgments of courts, must be deemed to have been paid under protest and the procedure and limitation etc. stated in Section 11B(2) read with Section 11B(3) will not apply to such cases. It need hardly be stated, that Section 11B(1), the proviso thereto, Section 11B(2) and Section 11B(3) read together will apply only to (1) refund applications made before the Amendment of the Act and still pending on the date of commencement of Amendment Act, 1991 and (2) applications contemplated under law to obtain refund and filed after the commencement of the Amendment Act, 1991. (Cases dealt with in Paras 5 and 29 of this judgment will not be covered by the above, to the extent stated therein).

In light of the aforesaid observations, the respondent No.3 was not justified in stating that here in this case, the order of central excise is of an adjudicating authority and not a court. Therefore, the above observations made in Para 146 of the Judgment are not squarely applicable in this case.

13. Regarding non-observations of the provisions contained in Rule 233-B of the Rules, our attention is drawn to the decision of this Court in the case of Parle International Ltd vs. Union of India, 2001 (127) ELT 329 (Guj.) wherein it is held as under :

"Under the Central Excise Act, there is only one duty that has been imposed on the manufacturer. The duty on excisable goods has to be paid before the clearance of the goods. The amount paid at that stage is the amount of duty and that amount of duty can be presumed to have been passed on to others. Whatever excise duty was charged at the relevant time, the incidence of which has been passed on to other persons, is not being claimed. There is no dispute so far as the proper amount of duty is concerned. Rule 233B is applicable at the time of clearance of the goods and not at any time thereafter. This provision cannot be applied in case where dispute was subsequently raised that the duty paid by the assessee was less than due. The instant case is of enhancing value of the material, for which the show cause notice was issued, on the basis of which the amount was paid. Therefore, this would amount to 'deposit' and not 'duty'. Rule 233B is clearly procedural in nature and in the instant case, the occasion to obtain refund does not arise out of the procedural provisions of the Rules. In the instant case, substantive right to get the refund arose in view of the order passed by the Tribunal. Under these circumstances, it is very clear that there is no question of following the procedure laid down under Section 233B and therefore, that would not disentitle the assessee from recovering the amount paid and recovered by the Department in contravention of law. This is only a deposit which was made with a view to avoid interest if ultimately it is held that the petitioner is liable to pay the amount demanded. It cannot be said that the assessee has recovered from its customers the amount subsequently deposited with the Revenue and thus enriched itself by collecting such amount from the customers. Therefore the Revenue is required to refund the amount of deposit with interest from the date of order of CEGAT".

Here, in the present case, the duty was demanded from the petitioner and under threat and compulsion the said duty was paid by the petitioner on 21.8.1995. Subsequently the show cause notice was issued, explanation was given and order of adjudication was passed on 18.4.2000 and pursuant to the directions given by the Commissioner of Central Excise to grant refund of Rs. 5,40,847/=, the

petitioner became entitled to the said refund. Thus, substantive right to get the refund arose in view of the order passed by the Commissioner of Central Excise and hence there was no question of following the procedure laid down in Rule 233-B of the Rules and its nonobservance of the said procedure would not disentitle the petitioner from recovering the amount paid in excess of the duty leviable. Thus the amount of duty originally paid by the petitioner was in the nature of deposit which was made with a view to avoid any severe consequence that was indicated to the petitioner and also to avoid interest if ultimately it was held that the petitioner was liable to pay the amount demanded.

14. It is also important to note here that keeping all these matters in mind, the respondent No.3, after verifying and ascertaining that the duty incidence had not passed on to any person, issued the show cause notice dated 9.8.2000 wherein it was admitted that the goods were fully exempted from excise duty and took a point of limitation only. It is evident from the letter dated 17.7.2000 written by the respondent No.3 and produced by the petitioner along with the affidavit-in-rejoinder that the respondent No.3 had only asked the petitioner to produce the relevant invoices for the period in question and accordingly the petitioner submitted all such invoices along with its letter dated 22.5.2000. The respondent No.3 had also communicated to the petitioner that non-supply of related documents like invoices etc., would render the refund claim of the petitioner as incomplete. After receipt of the required documents, the respondent No.3 acknowledged the refund claim vide its letter dated 27.10.2000. The petitioner has also thereafter produced a certificate to the effect that the incidence of duty has not been passed on to any person but it was borne by the petitioner. This would show that the petitioner's refund claim is squarely governed by the provisions contained in Section 11-B(1) & (2) of the Act. The said claim is also required to be allowed in view of the law laid down by the Hon'ble Supreme Court in the case of Mafatlal Industries Ltd v. Union of India (Supra) and the decision of this Court in the case of Parle International Ltd v. Union of India (Supra).

15. In view of the aforesaid situation, we are of the view that the petitioner is entitled to the refund of Rs. 5,40,847/=. The respondents are, therefore, directed to grant the refund of Rs. 5,40,847/= along with interest at the rate of 12 per cent from the date of the order of the Commissioner of Central Excise till the date of the payment. The respondents are further directed to pay the

said amount along with interest on or before 31st October 2002 failing which the respondents will have to pay the interest at the rate of 15 per cent p.a. for the subsequent period.

16. The petition, therefore, stands allowed to the aforesaid extent. Rule is made absolute accordingly with no order as to costs.

rmr. [M.S. Shah, J.]

[K.A. Puj, J.]